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February 22, 2006

State Water Resources Control Board
Office of Chief Counsel
Attn: Dolores White
Staff Services Analyst
1001 "I" Street, 22nd Floor
Sacramento, CA 95814

RE: Petition for Review of Order No. R9-2007-0001/NPDES Permit No.
CAS0108758

Dear State Board:

The San Diego County Office of Education Municipal Storm Water Group and the North County Transit District (collectively "Petitioners") respectfully submit this letter to petition the State Water Resources Control Board ("State Board") for review of the California Regional Water Quality Control Board, San Diego Region's ("Regional Board") adoption of Order No. R9-2007-0001/NPDES Permit No. CAS0108758 ("Permit").

Petitioner San Diego County Office of Education Municipal Storm Water Group are an organization of school and community college districts in San Diego County that have organized for the purpose of collectively generating and implementing Storm Water Management Programs that meet the requirements of the State Small MS4 General Permit. Petitioner North County Transit District is a public agency that operates bus services and rail lines throughout Northern San Diego County. Independent of one another and prior to the Permit's adoption, Petitioners chose to take a pro-active approach to storm water management and play a positive role in the ongoing urban runoff challenges the San Diego area faces. In furtherance of this mission, Petitioners developed Storm Water Management Programs that conformed to the requirements of the State Small MS4 General Permit and submitted them to the Regional Board for review. Although the Regional Board did provide helpful comments on the programs, it did not grant coverage under the general permit.

Petitioners are very concerned that the terms of the Large MS4 Permit will adversely affect their efforts at improving the storm water situation in San Diego County. This is because

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the Permit requires Large MS4 operators in San Diego County to regulate discharges to their MS4 systems from systems operated by entities such as Petitioners. Petitioners planned for and were expecting direct regulation by the Regional Board, and are concerned that regulation by the numerous municipalities in San Diego County will result in inconsistent enforcement actions.

Petitioners raised these concerns with the Regional Board during the comment period, however the Regional Board chose to adopt the Permit without amending it to address them. Although Petitioners recognize that the Regional Board has a difficult job in drafting and adopting a storm water permit that meets everyone's needs, Petitioners feel that to the extent that the Permit requires Large MS4 operators to regulate Small MS4s, the structure of the Permit is fundamentally flawed. Accordingly, Petitioners have chosen to file the attached petition in the hope that the State Board will amend the Permit to redress Petitioners' concerns. To that end, please find the attached Petition and Memorandum of Points and Authorities in Support of the Petition.

Thank you for your attention to this matter. Please do not hesitate to contact us with any questions or concerns regarding this letter, or the attached petition.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.G. Monette', with a stylized flourish at the end.

J.G. Andre Monette
for BEST BEST & KRIEGER LLP

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the matter of the Petition of:

THE SAN DIEGO COUNTY OFFICE OF
EDUCATION; AND THE NORTH
COUNTY TRANSIT DISTRICT

FOR REVIEW OF ACTION BY THE
CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD, SAN
DIEGO REGION, IN ADOPTING
ORDER NO. R9-2007-0001, NPDES
PERMIT NO. CAS0108758

Case No.

PETITION FOR REVIEW

[Water Code § 13320(a)]

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North County Transit District

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I.

INTRODUCTION

1. Petitioners San Diego County Office of Education Municipal Storm Water Group and North County Transit District (collectively "Petitioners") respectfully submit this Petition for Review of the California Regional Water Quality Control Board, San Diego Region's ("Regional Board") adoption of Order No. R9-2007-0001/NPDES Permit No. CAS0108758 ("Permit"). The Regional Board adopted the Permit on January 24, 2007.

2. Petitioners San Diego County Office of Education Municipal Storm Water Group are an organization of school and community college districts in San Diego County that have organized for the purpose of collectively generating and implementing Storm Water Management Programs that meet the requirements of the State Small MS4 General Permit. Petitioner North County Transit District is a public agency that operates bus services and rail lines throughout Northern San Diego County. Independent of one another and prior to the Permit's adoption, Petitioners chose to take a pro-active approach to storm water management and play a positive role in the ongoing urban runoff challenges the San Diego area faces. To that end, Petitioners developed Storm Water Management Programs that conformed to the requirements of the State Small MS4 General Permit. Petitioners submitted these programs to the Regional Board for review, and although the Regional Board did provide helpful comments, it did not grant Petitioners coverage under the general permit.

3. Although Petitioners appreciate the difficult job the Regional Board is presented with, Petitioners contend that in adopting the Permit the Regional Board abused its discretion. This is because: (1) the Regional Board has structured the Permit in a manner that will force Large MS4 operators in San Diego County to regulate Small MS4 operators (such as Petitioners) in a manner that will expose Petitioners to inconsistent enforcement; (2) the Regional Board has adopted this permitting scheme while at the same time refusing to grant Small MS4 General Permit coverage to "non-traditional" Small MS4 operators, and is thereby requiring Large MS4 operators in San Diego County to perform the Regional Board's enforcement duties for it; and (3) the Permit's terms provide no clarity on the role of the State Small MS4 General Permit in

1 relation to the requirements that Large MS4 operators may place on Small MS4 operators.

2 4. The Petitioners therefore submit this Petition for review of the Permit pursuant to
3 Water Code section 13320 and Title 23 of the California Code of Regulations, and respectfully
4 request that the State Board correct the Regional Board's actions. In order to remedy the above
5 stated deficiencies, Petitioners respectfully request that the State Board require the Regional
6 Board to grant Petitioners coverage under the State Small MS4 General Permit, while at the same
7 time removing responsibility for storm water compliance at Petitioners' facilities from Large
8 MS4 operators. In the alternative, should the State Board choose to focus solely on the terms of
9 the Permit, Petitioners respectfully request that the State Board amend the Permit to: (1) relieve
10 Large MS4 operators of responsibility for enforcing any storm water requirements against Small
11 MS4 operators; or (2) relieve Large MS4 operators of the responsibility of enforcing storm water
12 requirements against Small MS4 operators who comply with the terms of the State's Small MS4
13 General Permit.

14 II.

15 NAMES AND ADDRESSES OF PETITIONERS

16 5. The names and contact information for Petitioners is as follows:

17 San Diego County Office of
18 Education Municipal Storm
19 Water Group:

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24 III.

25 ACTIONS OF THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD 26 THAT ARE THE SUBJECT OF THIS PETITION

27 6. Petitioners seek review of the Regional Board's adoption of Order No. R9-2007-
28 0001/NPDES No. CAS0108758, entitled "Waste Discharge Requirements for Discharges of

1 Urban Runoff from the Municipal Separate Storm Sewer Systems (MS4s) Draining the
2 Watersheds of the County of San Diego, the Incorporated Cities of San Diego, the San Diego
3 Unified Port District, and the San Diego County Regional Airport Authority.” A copy of the
4 Permit is attached hereto as Exhibit “A” and incorporated herein.

5 IV.

6 DATE THAT THE REGIONAL BOARD ACTED

7 7. The Regional Board adopted the Permit on January 24, 2007.

8 V.

9 STATEMENT OF REASONS THE ACTION WAS INAPPROPRIATE

10 8. Petitioners recognize that the Regional Board is presented with a difficult job,
11 however, Petitioners contend that in adopting the Permit the Regional Board abused its discretion.
12 This is because: (1) the Regional Board has structured the Permit in a manner that will force
13 Large MS4 operators in San Diego County to regulate Small MS4 operators (such as Petitioners)
14 in a manner that will expose Petitioners to inconsistent enforcement; (2) the Regional Board has
15 adopted this permitting scheme while at the same time refusing to grant Small MS4 General
16 Permit coverage to “non-traditional” Small MS4 operators, and has thereby required Large MS4
17 operators in San Diego County to perform the Regional Board’s enforcement duties for it; and (3)
18 the Permit’s terms provide no clarity on the role of the State Small MS4 General Permit in
19 relation to the requirements that Large MS4 operators may place on Small MS4 operators.

20 9. Through counsel, Petitioners submitted oral and written comments to the Regional
21 Board setting forth these concerns (*See* Regional Board, Responses to Comments II on Revised
22 Tentative Order No R9-2006-0011, p. 12) (Exhibit “A” attached). The Regional Board, however,
23 declined to take any action to amend the Permit to prevent it from creating this system of storm
24 water enforcement. It is the Petitioners’ contention that by failing to do so, the Regional Board
25 has abused its discretion. The factual and legal support for the Petitioners’ claims is more fully
26 set forth in the Memorandum of Points and Authorities filed herewith.

VI.

HOW PETITIONERS ARE AGGRIEVED

10. Petitioners own and operate a number of facilities that meet the federal definition of a Regulated Small MS4. (40 C.F.R. § 122.32) Despite the fact that the State Board has identified many of Petitioners' facilities as "non-traditional Small MS4s anticipated to be designated" for coverage under a Small MS4 permit (*See* State Board, Order No. 2003-0005-DWQ, Attachment 3), the Regional Board has yet to grant permit coverage to any of Petitioners' facilities. Under the terms of the Permit, it now appears that the Regional Board is seeking to regulate Petitioners by proxy instead of regulating Petitioners itself under the State Small MS4 General Permit.

11. The terms of the Permit require all Large MS4 operators in San Diego County to regulate inputs to their MS4. This will require Large MS4 operators to enforce storm water requirements against anyone discharging to their MS4, and will put Petitioners at risk of having different Large MS4 operators seek to enforce storm water requirements against them. The Permit does not contain standardized enforcement mechanisms (e.g. compliance with the terms of the State Small MS4 General Permit) to protect Small MS4 operators in these instances.

12. Because the terms of the Permit provide no clarity on the role of the Small MS4 General Permit, the Regional Board has left both Large and Small MS4 operators in limbo about whether compliance with the Small MS4 requirements is sufficient to comply with the Permit. This is, again, because the Permit does not articulate a standard that Large MS4 operators must apply when addressing inputs to their MS4 from Small MS4 operations, and further holds Large MS4 operators responsible for all such inputs. There is no guarantee that Large MS4 operators will impose a standard of compliance on Petitioners that is equivalent to the State Small MS4 General Permit. Accordingly, although the Regional Board is not seeking to regulate Petitioners under the State Small MS4 General Permit, it is instead forcing the Large MS4 operators to do its job for it, and thereby holding Petitioners to a different standard than what the Clean Water Act would require.

13. Lastly, Petitioners are aggrieved because they expended substantial time and

resources in developing a Storm Water Management Program that complied with the terms of the State Small MS4 General Permit. Petitioners submitted these plans to the Regional Board for review, only to have the Regional Board decline to regulate them as permitted Small MS4s. Instead, it appears that the Regional Board has required Large MS4 operators to perform its compliance enforcement duties. In so doing, the Regional Board has violated the Ninth Circuit Court of Appeals decision in *Environmental Defense Center v. EPA* (9th Cir. 2003) 344 F.3d 832. That decision requires permitting agencies such as the Regional Board to undertake specific review requirements before granting Small MS4 permits, thereby regulating Small MS4s under the auspices of the Clean Water Act. It is the Petitioners' contention that the Regional Board cannot sidestep these requirements by refusing to grant Petitioners Small MS4 permit coverage and then regulating them by proxy.

14. Beyond that, the Regional Board has effectively denied Petitioners, and Small MS4 operators in general, any protection or certainty they might have gained by complying with the terms of the State's Small MS4 General Permit. In essence, the Regional Board has told Small MS4 operators that compliance with the terms of the State General Permit is not enough, and that they should expect multiple sources of regulation.

15. Petitioners attempted to correct the problems with the Regional Board's action by providing input to the Regional Board during the Permit renewal process. To that end, Petitioners participated in the administrative process of the Permit's development by, among other things, submitting written comments on Permit drafts and personally meeting with Regional Board staff. However, the Regional Board did not amend the Permit to address Petitioners' comments, and Petitioners are therefore aggrieved by the Regional Board's action.

VII.

ACTIONS PETITIONERS REQUEST THE STATE WATER BOARD TO TAKE

16. In order to remedy the above stated deficiencies, Petitioners respectfully request that the State Board require the Regional Board to grant Petitioners coverage under the State Small MS4 General Permit, while at the same time removing responsibility for storm water compliance at Petitioners' facilities from Large MS4 operators. In the alternative, should the State

1 Board choose to focus solely on the terms of the Permit, Petitioners respectfully request that the
2 State Board amend the Permit to: (1) relieve Large MS4 operators of responsibility for enforcing
3 any storm water requirements against Small MS4 operators; or (2) relieve Large MS4 operators
4 of the responsibility of enforcing storm water requirements against Small MS4 operators who
5 comply with the terms of the State's Small MS4 General Permit.

6 **VIII.**

7 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION**

8 17. Petitioners have filed a separate Memorandum of Points and Authorities with this
9 Petition and, by this reference, that Memorandum is incorporated into this Petition as if fully set
10 forth at this point.

11 **IX.**

12 **LIST OF PERSONS INTERESTED IN THIS MATTER**

13 18. Petitioners have requested that the Regional Board forward a list of interested
14 persons to the State Board.

15 **X.**

16 **STATEMENT OF COPIES FURNISHED**

17 19. In accordance with the requirements of Title 23, Section 2050(a)(8) of the
18 California Code of Regulations, a copy of this Petition has been sent to the California Regional
19 Water Quality Control Board, San Diego Region.

20 **XI.**

21 **ADMINISTRATIVE RECORD**

22 20. Petitioners have requested that the Regional Board prepare a copy of the
23 administrative record for the State Board's review.

24 **XII.**

25 **CONCLUSION**

26 21. For the reasons set forth in the Petition and in the related documents filed
27 herewith, Petitioners respectfully request that the State Water Resources Control Board review
28 the Permit and take the actions requested herein or any other actions that the State Board deems

appropriate.

Dated: February 22, 2007

BEST BEST & KRIEGER LLP

By:

Attorneys for Petitioners

**San Diego County Office of Education
Municipal Storm Water Group**

And:

Attorneys for Petitioners

North County Transit District

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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the matter of the Petition of:

THE SAN DIEGO COUNTY OFFICE OF
EDUCATION

FOR REVIEW OF ACTION BY THE
CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD, SAN
DIEGO REGION, IN ADOPTING
ORDER NO. R9-2007-0001, NPDES
PERMIT NO. CAS0108758

Case No.

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION FOR REVIEW

[Water Code § 13320(a)]

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Petitioners San Diego County Office of Education Municipal Storm Water Group and North County Transit District (collectively "Petitioners") respectfully submit this Memorandum of Points and Authorities in Support of their Petition for Review:

I.

INTRODUCTION

Petitioners seek review of the California Regional Water Quality Control Board, San Diego Region's ("Regional Board") adoption of Order No. R9-2007-0001/NPDES Permit No. CAS0108758 ("Permit"). Petitioners contend that in adopting the Permit the Regional Board abused its discretion because: (1) the Regional Board has structured the Permit in a manner that will force Large MS4 operators in San Diego County to regulate Small MS4 operators (such as Petitioners) in a manner that will expose Petitioners to inconsistent enforcement; (2) the Regional Board has adopted this permitting scheme while at the same time refusing to grant Small MS4 General Permit coverage to "non-traditional" Small MS4 operators, and is thereby requiring Large MS4 operators in San Diego County to perform the Regional Board's enforcement duties for it; and (3) the Permit's terms provide no clarity on the role of the State Small MS4 General Permit in relation to the requirements that Large MS4 operators may place on Small MS4 operators.

Despite Petitioners' attempts to bring these deficiencies to the attention of the Regional Board, the Regional Board failed to amend the Permit to prevent them from occurring. By adopting the Permit in its current form, the Regional Board abused its discretion. The Petitioners therefore respectfully request that the State Board correct the Regional Board's action.

Ideally, Petitioners would like the State Board to require the Regional Board to grant Petitioners coverage under the State Small MS4 General Permit, and remove responsibility for storm water compliance at Petitioners' facilities from Large MS4 operators. In the context of the Regional Board's adoption of the Permit, Petitioners request that the State Board amend the Permit to: (1) relieve Large MS4 operators of responsibility for enforcing any storm water requirements against Small MS4 operators; or (2) relieve Large MS4 operators of the responsibility of enforcing storm water requirements against Small MS4 operators who comply

1 with the terms of the State's Small MS4 General Permit.

2 **II.**

3 **REASONS WHY THE REGIONAL BOARD'S ACTIONS WERE IMPROPER**

4 **A. THE TERMS OF THE PERMIT EXPOSE PETITIONERS TO MULTIPLE SOURCES OF LIABILITY**

5 The terms of the Permit require all Large MS4 operators in San Diego County to regulate
6 inputs to their MS4. This requires Large MS4 operators to enforce storm water requirements
7 against anyone discharging to their MS4 including Small MS4 operators whose MS4s happen to
8 discharge to a Large MS4 before entering the waters of the United States. This requirement
9 exposes Petitioners to multiple sources of liability because it places responsibility for
10 enforcement in the hands of a numerous agencies that may or may not be in agreement on what is
11 required to meet the terms of the Permit. The Permit does not contain standardized enforcement
12 mechanisms (e.g. compliance with the terms of the State Small MS4 General Permit) to protect
13 such Small MS4 operators, and as such creates the potential for inconsistent enforcement actions
14 against the Petitioners.

15 **B. THE REGIONAL BOARD HAS VIOLATED FEDERAL LAW BY ADOPTING A PERMIT THAT**
16 **REGULATES PETITIONERS BY PROXY**

17 By adopting the Permit in its current state, the Regional Board is forcing Large MS4
18 operators to take over the Regional Board's Small MS4 enforcement duties. While courts have
19 held that a dual storm water inspection and enforcement system is enforceable, (*See City of*
20 *Rancho Cucamonga v. Regional Water Quality Control Board*, (2006) 135 Cal. App. 4th 1377.)
21 the Regional Board may not transfer all of its enforcement obligations to other entities. The
22 Regional Board has effectively conveyed all of its Small MS4 storm water responsibilities to
23 Large MS4 operators by requiring Large MS4 operators to enforce storm water requirements
24 against Small MS4s while at the same time declining to grant general permit coverage to entities
25 that meet the federal requirements for Small MS4 permitting.

26 Presumably, the State and Regional boards are not regulating these entities because they
27 currently lack the staff to undertake such a process. The State Board eluded to this possibility
28 when it stated that it is not regulating "non-traditional Small MS4s" under the Small MS4 General

1 Permit because "each NOI and SWMP must be reviewed and approved, and in some cases
2 considered in a public hearing." (State Board, Order No. 2003-0005-DWQ, p.3-4.) This leaves,
3 however, an entire class of Small MS4s that the Regional Board is not directly regulating.

4 Although Petitioners appreciate the fact that the Regional Board may lack the staff to
5 adequately regulate these entities itself, the Regional Board cannot regulate Small MS4s by proxy
6 by requiring Large MS4 operators to take over its duties. Yet, by the terms of the Permit, that is
7 what the Regional Board is seeking to do. To the extent that the Regional Board is seeking to
8 regulate Small MS4s through the Permit rather than under the State Small MS4 General Permit, it
9 is acting in contravention of the Ninth Circuit Court of Appeals' decision in *Environmental*
10 *Defense Center v. EPA* (9th Cir. 2003) 344 F.3d 832. That decision requires the Regional Boards
11 to undertake review and approval procedures such as reviewing each Notice of Intent and Storm
12 Water Management Program before granting a Small MS4 Permit under the Clean Water Act. (*Id.*
13 at 852-858) The Regional Board cannot sidestep these requirements by designating a proxy
14 regulating authority i.e. the Large MS4 operators.

15 **C. THE PERMIT PROVIDES NO CLARITY ON THE ROLE OF THE STATE SMALL MS4**
16 **GENERAL PERMIT**

17 Because the terms of the Permit provide no clarity on the role of the Small MS4 General
18 Permit, the Regional Board has left both Large and Small MS4 operators in limbo about whether
19 compliance with the Small MS4 requirements is sufficient to comply with the Permit. In the best
20 of all possible worlds, compliance with the general permit would be sufficient to comply with the
21 terms of the Permit as it would result in clean discharges from all complying Small MS4s and
22 thereby remove the need for enforcement actions on the part of the Large MS4 operators. That
23 may or may not be the case, however, and the fact that the Permit does not clearly define the
24 relationship between the Small and Large MS4 General Permits at the very least creates
25 significant ambiguity.

26 This ambiguity could result in Large MS4 operators imposing a higher level of
27 compliance on Petitioners than either the Regional Board, the State Board, or the EPA would
28 place directly on the Small MS4 operators. There is no guarantee that Large MS4 operators will

1 impose a standard of compliance on Petitioners that is equivalent to the State Small MS4 General
2 Permit. Thus, by declining to regulate petitioners directly and instead pursuing a proxy regulatory
3 scheme, the Regional Board is holding Petitioners to a different standard than what the Clean
4 Water Act requires.

5 **D. THE REGIONAL BOARD ABUSED ITS DISCRETION**

6 In California, the individual Regional Water Quality Control Boards are responsible for
7 issuing NPDES permits. Pursuant to its NPDES permitting authority, the Regional Board issued
8 the Permit on January 24, 2007. The Regional Board failed to design the Permit in a manner that
9 would avoid the above mentioned deficiencies.

10 Despite the Petitioners' best efforts to bring this to the Regional Board's attention during
11 the permit renewal process, the Regional Board refused to amend the Permit to remedy these
12 deficiencies before adopting it. By adopting the Permit in its current form, the Regional Board
13 has abused its discretion. Petitioners therefore respectfully request this Board to either require the
14 Regional Board correct these actions or correct them for it.

15 **III.**

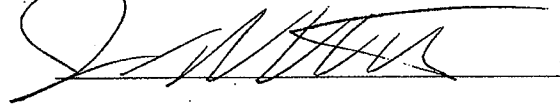
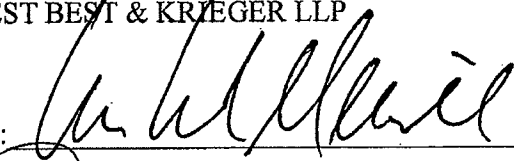
16 **CONCLUSION**

17 For the reasons set forth in this Petition and in the related documents filed herewith,
18 Petitioners respectfully request that the State Water Resources Control Board review the Permit
19 and take the actions requested herein or any other actions that the State Board deems appropriate.
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1 Dated: February 22, 2007

BEST BEST & KRIEGER LLP

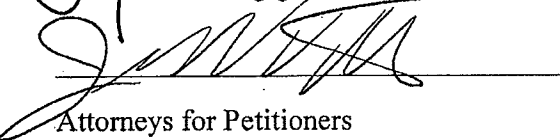
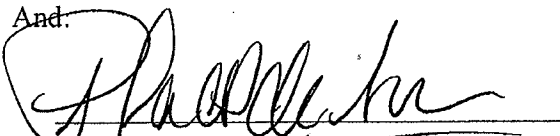
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3 By:



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5 Attorneys for Petitioners

6 San Diego County Office of Education
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8
9 And.



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11 Attorneys for Petitioners

12 North County Transit District